



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Utah State Office

P.O. Box 45155

Salt Lake City, UT 84145-0155

<http://www.blm.gov/ut/st/en.html>



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3100/(UT-922000)

January 16, 2013

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Return Receipt Requested

### DECISION

Rocky Mountain Wild	:	Protest to the Inclusion of Certain
Matthew Sandler, Staff Attorney	:	Parcels in the November 13, 2012
1536 Wynkoop, Suite 303	:	Competitive Oil and Gas Lease Sale
Denver, Colorado 80202		

### Protest Denied

On August 14, 2012, the Bureau of Land Management (BLM) issued its Notice of Competitive Lease Sale (NCLS) providing notice to the public that certain parcels of land would be offered in a competitive oil and gas lease sale scheduled for November 13, 2012. In a letter received by the BLM on September 13, 2012, Rocky Mountain Wild (RMW) protested the inclusion in the sale of the following 10 parcels located on public lands managed by the BLM's Richfield, Price and Vernal Field Offices:<sup>1</sup>

UT0512-004	UT1112-011	UT1112-015	UT1112-016	UT1112-019
UT1112-020	UT1112-032	UT1112-037	UT1112-040	UT1112-042

By erratum issued on October 25, 2012, the BLM deferred parcels UT1112-015, UT1112-019, UT1112-020, and UT1112-042 from the sale. Thus, the protest as it pertains to these four parcels is hereby dismissed as moot. The BLM also divided Parcel UT1112-032 into two parcels: with parcel UT1112-032 comprised of lands within the Johnson Bottom Unit and parcel UT1112-032A comprised of lands outside of the Unit. Consequently, this decision responds to the RMW protest as it pertains to the remaining seven parcels: UT0512-004, UT1112-011, UT1112-016, UT1112-032, UT1112-032A, UT1112-037, and UT1112-040.

RMW generally alleges that in offering the subject parcels for lease, the BLM violated the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Federal Land Policy and Management Act (FLPMA).

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<sup>1</sup> The RMW protest initially lists 9 parcels at section I (page 1) but it also includes parcel UT1112-004 at section IV A 1 (page 3) of its protest.

For the reasons set forth below, I have determined that the BLM complied with the requirements of NEPA, ESA and FLPMA and other applicable Federal laws and regulations prior to the inclusion of the subject parcels in the November 13, 2012, lease sale. Consequently, the RMW protest as it pertains to the seven remaining parcels is denied.

### **Protest Contentions and BLM Responses**

Protest Contention: Oil and gas development authorized by leasing of the protested parcels will have significant impacts on the greater sage-grouse within parcels UT0512-004 and UT1112-011. Leasing large acreages of important sage grouse habitat prior to the completion of regional conservation planning efforts will push the species closer to a full listing and must therefore be avoided. Pending final decisions on the resource management plan amendments and the regional planning process that apply the recommendations of the technical team report, the BLM should proceed with caution and avoid any additional leasing in occupied habitat. The BLM's failure to consider the report requires deferral of the protested parcels. Protest at IVA1 (pages 3-4).

The BLM has a duty to conserve and engage in recovery planning. Consultation with the United States Fish and Wildlife Service (USFWS) should have been conducted to ensure adequate protection for greater sage-grouse. The BLM's actions in leasing occupied habitat for energy development further demonstrate the agency's lack of protective mechanisms. Protest at VIIa (pages 8-9).

BLM Response: Parcels UT0512-004 and UT1112-011 do not occur within preliminary priority habitat for the greater sage-grouse.<sup>2</sup> The BLM refers RMW to our November 2012 Deferred Lands List.<sup>3</sup> As shown, the BLM deferred a grand total of 183,365 acres from the November 2012 lease sale. Of which, 42,629.07 acres are directly attributed to the presence of occupied greater sage-grouse habitat.

The BLM consulted with the USFWS in preparing for the lease sale. The BLM also coordinated with the Utah Division of Wildlife Resources (UDWR). Both of these agencies, who have jurisdiction by law and expertise, were involved with the BLM's application of stipulations and notices on relevant parcels. The UDWR did not have greater sage-grouse concerns given the current restrictions placed on the subject parcels. The BLM issued the October 25, 2012, erratum based on coordination with the USFWS.

On October 25, 2011, the USFWS concurred with a "no effect" determination on the Sevier County parcel (UT0512-004). This parcel is not located within potential known or potential listed threatened or endangered plant and animal species habitat. Because the May 2013 sale was delayed, the BLM re-initiated consultation and included this parcel with the November 2012 sale list. As such, on August 31, 2012, the USFWS concurred with a "may affect, not likely to adversely affect" determination and the application of stipulations and notices for the Endangered Fish of the Upper Colorado River Drainage Basin, Mexican Spotted Owl, Clay Reed-Mustard, San Rafael Cactus, Uinta Basin Hookless Cactus and the Wright Fishhook Cactus.

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<sup>2</sup> Preliminary priority habitat for the greater sage-grouse is referenced in Washington Office Instruction Memorandum 2012-043. Within Utah, all occupied habitat is treated as preliminary priority habitat.

<sup>3</sup> The Deferred Lands List has been updated to reflect errata issued on 10/15/12 and 10/25/12 and can be accessed online at: [http://www.blm.gov/ut/st/en/prog/energy/oil\\_and\\_gas/oil\\_and\\_gas\\_lease.html](http://www.blm.gov/ut/st/en/prog/energy/oil_and_gas/oil_and_gas_lease.html)

The BLM Utah continues to participate in the National Greater Sage-Grouse Planning Strategy.<sup>4</sup> The land use plan amendment process specifically includes the Richfield, Price and Vernal Resource Management Plans (RMPs). Additional information on this process, including its status, is maintained online.<sup>5</sup> The BLM and other agencies are working with the USFWS and UDWR and maintaining close coordination, cooperation, and partnership on region-specific conservation and habitat restoration measures. As previously stated, oil and gas leasing has generally been deferred within greater sage-grouse preliminary priority habitat in accordance with the BLM's interim management for the greater sage-grouse (WO IM 2012-043).

Protest Contention: Parcels UT1112-032, UT1112-032A, and UT1112-037 occur within black footed ferret management or occurrence areas and should be withdrawn from leasing. Protest at IVA2 (page 4).

BLM Response: Parcels UT1112-032, UT1112-032A, and UT1112-037 occur outside of the Coyote Basin primary management zone (PMZ). As stated in the Vernal Field Office RMP and Final Environmental Impact Statement (page 3-95), the black footed ferret has been reintroduced to northeast Utah, and the USFWS considers all of Uintah and Duchesne Counties to be within the experimental population area. The BLM manages this species in accordance with the 1999 Black-Footed Ferret Reintroduction Plan Amendment and applicable portions of the Cooperative Plan for the Reintroduction and Management of the Black-Footed Ferret in Coyote Basin, Uintah County, Utah. RMW has not presented any information in its protest showing that the BLM erred in its analysis or failed to consider relevant information in its consultation and coordination with the USFWS and UDWR.

Protest Contention: According to the UDWR, parcels UT1112-020 and UT1112-040 occur near Uinta Basin hookless cactus and Graham's beardtongue (penstemon) populations, listed and candidate species, respectively. Parcel UT1112-020 does not have a stipulation to address the presence of the cactus. Development including road construction, fugitive dust, water use and water contamination, threatens the recovery of Graham's beardtongue and the BLM should withdraw parcel UT1112-040. Protest at IVA3 (page 4).

BLM Response: Potential habitat for Graham's beardtongue was identified on parcel UT1112-040. Therefore, lease notice UT-LN-90 was attached to this parcel. RMW has not shown that the avoidance and minimization measures identified within the notice do not address its concern as it relates to project design and infrastructure.

The BLM also applies lease notice T&E-05 (listed plant species) as warranted. Among other actions, this notice specifically states that additional measures to avoid or minimize effects to the species may be developed and implemented in consultation with the USFWS between the lease sale stage and lease development stage to ensure continued compliance with the ESA. RMW does not take the management implications of this notice or any other into consideration in its protest.

Parcel UT1112-020 was deferred; therefore, RMW's protest regarding the Uinta Basin hookless cactus is moot at this point.

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<sup>4</sup> As described in the BLM's Greater Sage-Grouse Planning Strategy WO IM 2012-044. Accessed online at: [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2012/IM\\_2012-044.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-044.html)

<sup>5</sup> Information regarding the land use plan amendment process can be accessed online at: <http://www.blm.gov/wo/st/en/prog/more/sagegrouse/western.html>

As the RMW protest implies, the presence of a candidate or even a listed species on a parcel does not automatically warrant the withdrawal of the parcel from a lease sale. In the present case, the BLM field biologists and botanists carefully reviewed the individual lease parcels included in the lease sale. Based on their review and professional judgment using the best available information, the BLM applied applicable stipulations and or notices as warranted.

Protest Contention: Parcel UT1112-016 occurs within the Nine Mile Canyon Area of Critical Environmental Concern (ACEC). Leasing within the ACEC will negatively impact the nature of this special area. Even with stipulations, development will still require access to mineral reserves. Drilling adjacent to the ACEC boundary will impact the ACEC. Further, some of the stipulations aimed at protecting these areas can be waived, modified or exempted. Leasing within ACEC boundary is improper and this parcel should be withdrawn. Protest at IVB1 a-b (pages 4-5).

BLM Response: According to the Price Field Office Approved RMP, the Nine Mile Canyon area is managed as an ACEC. The ACEC, including parcel UT1112-016 is open to oil and gas leasing subject to a no surface occupancy stipulation without exception, modification or waiver. The lease parcel had stipulation UT-S-319 on it. This stipulation was applied in error. The correct stipulation is UT-S-320 and it will be added to the lease upon issuance in place of UT-S-319.

The corresponding relevant and important (R&I) values are summarized in the Approved RMP at page 36. The RMW is, therefore, incorrect in asserting that leasing within the ACEC is inherently improper.

The Nine Mile Canyon ACEC's R&I values are cultural resources, high quality scenery and special status species. In the NCLS (as amended by the October 15, 2012, and October 25, 2012, errata), the BLM applied several stipulations and notices designed to maintain the R&I values (such as species specific stipulations, visual resources, steep slopes, watersheds, wildlife habitats, listed plant species, special status plants, migratory birds, and Utah sensitive species).

The RMW protest fails to include any information to support concluding that the R&I values are not being protected by these stipulations and notices in such manner that would warrant the withdrawal of parcel UT1112-016 from the lease sale.

Protest Contention: The decision fails to adequately analyze the direct, indirect and cumulative effects of leasing these parcels. The BLM failed to analyze the effectiveness of the lease stipulations and other mitigation measures identified in the relevant environmental assessment (EA), and the determination that lease stipulations and other mitigation measures will prevent significant impacts the lesser prairie chicken is arbitrary and capricious. The BLM must evaluate the effectiveness of the mitigation measures used in leasing with the best available science. Protest at V a-b (pages 5-6).

BLM Response: RMW has prematurely referred to a "decision" in its protest because, in accordance with Washington (WO) Instruction Memorandum (IM) 2010-117, the BLM issued its NCLS based on the corresponding EAs and unsigned Finding of No Significant Impact statements prepared by the relevant field offices. Further, the BLM addressed the direct, indirect and cumulative impacts on resources carried forward in the detailed analysis in chapter 4 of each EA (DOI-BLM-UT-C020-2011-043-EA, DOI-BLM-UT-G021-2012-0048-EA, and DOI-BLM-UT-G010-2012-174-EA) prepared by the Richfield, Price, and Vernal Field Offices. As per the respective Interdisciplinary Team Checklists, the EAs presented the known and predicted effects that are related to the issues at hand as required by the BLM's NEPA Handbook – 1790-1, section 6.8.1.1. The BLM incorporates by reference the analysis it prepared for the respective

RMPs and the corresponding final environmental impact statements (EISs), including the application of stipulations and notices. In addition, the potential cumulative impacts of mineral development decisions on special status species, is discussed in the Final EISs for the Richfield, Price, and Vernal RMPs (pages 4-601, 4-445, and 4-625, respectively).

RMW cites to certain federal regulations and case law in asserting that the BLM failed to analyze potential impacts, including the application of mitigation measures of leasing on greater sage-grouse,<sup>6</sup> black footed ferret, imperiled plants and other species throughout the planning area. However, because RMW did not specify what impacts it believes the BLM failed to address in its NEPA analyses, and provide any credible information to show that such impacts were foreseeable; RMW has not established any error in those analyses.

In its protest, RMW asserts that it participates in the BLM's oil and gas leasing process. However, the BLM's records do not show that RMW submitted any comments or feedback to the BLM during the available public comment periods while the BLM was preparing environmental assessments DOI-BLM-UT-C020-2011-043-EA (Richfield), DOI-BLM-UT-G010-2012-174-EA (Vernal) and DOI-BLM-UT-G021-2012-0048-EA (Price). Consequently, in its protest, RMW is not entitled to contend that the BLM failed to comply with NEPA in deciding what parcels to include in the lease sale.

Protest Contention: The BLM failed to prevent undue and unnecessary degradation to lesser prairie-chicken populations and potential conservation areas and has failed to meet its obligations under the BLM Manual 6840. The BLM must mitigate the adverse effects on the aforementioned imperiled species in order to comply with the unnecessary and undue degradation standard of FLPMA. The BLM must also mitigate adverse effects on sensitive resources within the ACEC[s]. The BLM is also violating FLPMA because it is not consistent with the policies of the state, tribal and other agencies in its conservation policies regarding the greater sage-grouse, black-footed ferret, imperiled plants and other species. Protest at VI a-c (pages 7-8).

BLM Response: The lesser prairie chicken does not occur within Utah. RMW does not identify which provisions of the BLM Manual 6840 it alleges that the BLM has failed to address. Similarly, RMW has not identified which State, Tribal or other agency policies or plan provision it believes the BLM has violated related to management of the greater sage-grouse, black-footed ferret, imperiled plants and other species. Consequently, the RMW protest is too vague to merit any response to the respective allegations.

Under FLPMA, the BLM is required to prevent unnecessary or undue degradation in its management of the federal public lands. However, RMW's contention that the BLM has violated FLPMA relies entirely on its unsupported assumption that the sale of the contested parcels will cause unnecessary or undue degradation to the lands underlying a parcel. Nothing in the NEPA analyses the BLM relied on in determining which parcels to include in the sale in any way supports this assumption, and the RMW protest provides no evidence to show otherwise. The mere issuance of leases does not constitute unnecessary or undue degradation of the public lands. Further, for one to show that oil and gas development would have this detrimental effect, one must at a minimum show that a lessee's operations would be conducted in a manner that does not comply with applicable law or regulations, prudent management and practice, or reasonably available technology. RMW's mere assertion that leasing of the protested parcels will cause unnecessary or undue degradation is groundless.

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<sup>6</sup> RMW refers to the greater sage-grouse and the lesser prairie chicken throughout its protest. Both are distinct and separate species.

Protest Contention: Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion over whether or not to offer these lease parcels for sale. The arguments set forth in detail above demonstrate that exercise of the discretion not to lease the protested parcels is appropriate and necessary. Withdrawing the protested parcels from the lease sale until the BLM has met its legal obligations to conduct an adequate NEPA analysis by responding to public comment, upheld the requirements of the ESA and met the requirements of WO IM 2010-117 and other BLM regulations is a proper exercise of the BLM's discretion under the Mineral Leasing Act. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law. Protest at VIII (page 9).

BLM Response: The BLM concurs with RMW in that it retains full discretion over whether or not to offer the protested parcels for sale. However, RMW has failed to provide evidence in its protest to support a BLM decision to withdraw the protested parcels from the lease sale.

The BLM's procedures for managing oil and gas leasing and development activities are well established through land use planning, parcel nomination, competitive leasing, well permitting, development, operations, production, plugging and reclamation. Should a complete application for permit to drill (APD) be received, the BLM will again initiate the NEPA process based on the information in the APD. Attempting to determine the potential impacts of development would be unduly speculative and impractical without the submission of a complete APD.

Overall, the RMW protest fails to provide specific facts or information to show how its allegations apply to specific protested parcels. It is well established that the BLM properly dismisses a protest where the protestant makes only conclusory or vague allegations or the protestant's allegations are unsupported by facts in the record or competent evidence. The BLM is under no obligation to sort through a protestant's list of alleged errors and attempt to discern which alleged errors the protestant intended to invoke for a particular parcel. Such an unduly burdensome and inefficient process would unreasonably divert the time and resources that the BLM otherwise needs to manage the public lands as mandated by Congress.

For the BLM to have a reasonable basis to consider future protests, RMW must identify the specific ground for protest and explain how it applies to each protested parcel. Any allegations of error based on fact must be supported by competent evidence. Further, RMW must consider whether any lease stipulations or notices that apply to a particular parcel may be relevant to its allegations, and explain how such stipulations or notices do not obviate the allegations. Failure to comply with any of the foregoing may result in the summary dismissal of the protest.

### **Conclusion**

As the party challenging the BLM's inclusion of certain parcels in the November 13, 2012 lease sale, RMW bears the burden of establishing that the BLM's action was premised on a clear error of law or material fact, or that the BLM failed to consider a substantial environmental question of material significance. RMW has not met this burden. To the extent that RMW has raised any allegations not specifically discussed herein, they have been considered and are found to be without merit. For this reason, and for those previously discussed, the RMW protest as it pertains to the seven remaining parcels (UT0512-004, UT1112-011, UT1112-016, UT1112-032, UT1112-032A, UT1112-037 and UT1112-040) is denied.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. Part 4 and Form 1842-1 (Enclosure 1). If an appeal is taken, the notice of appeal must be filed in this office (at the address shown on the enclosed Form) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay pursuant to 43 C.F.R. Part 4, Subpart B § 4.21, during the time that your appeal is being reviewed by the Board, the petition must show sufficient justification based on the standards listed below. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

Copies of the notice of appeal, petition for stay, and statement of reasons also must be submitted to the Office of the Regional Solicitor, Intermountain Region, 125 South State Street, Suite 6201, Salt Lake City, Utah 84138, at the same time the original documents are filed in this office.

Enclosed is a list of the parties (Enclosure 2) who purchased these parcels at the lease sale; and who, therefore, must be served with a copy of any notice of appeal, petition for stay, and statement of reasons.

/s/ Juan Palma

Juan Palma  
State Director

Enclosures

1. Form 1842-1
2. List of Purchasers

cc: James Karkut, Office of the Solicitor, Intermountain Region,  
125 South State Street, Suite 6201, Salt Lake City, Utah 84138

bcc: Lease Sale Book Nov2012  
Reading File: UT-910, UT-920, UT-930  
Central Files UT-950

Enclosure 1  
Form 1842-1



(Reserved/Insert Form 1842-1)

Enclosure 2  
List of Purchasers

**Parcel**

**Purchaser**

UT0512-004

Pioneer Oil & Gas  
Don J Colton  
1206 W South Jordan PKWY B  
South Jordan, UT 84095

UT1112-011

Thunderbird Energy Corp  
Rick Ironside  
555 4<sup>TH</sup> Avenue SW #800  
Calgary Alberta, CA T20 3E7

UT1112-016  
UT1112-032  
UT1112-032A

Turner Petro Land  
Curtis Turner  
600 East 9400 South  
Sandy, UT 84070

UT1112-037

Mercury Capital LLC  
Jeremy Westphal  
488 H Street  
Salt Lake City, UT 84103

UT1112-040

Robert L Bayless LLC  
Lane Lasrich  
612 17<sup>TH</sup> ST #2300  
Denver, CO 80293